

MOTION FILED

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No. 96-1569

In The
Supreme Court of the United States
October Term, 1996

DANIEL BOGAN and MARILYN RODERICK,
Petitioners,

vs.
JANET SCOTT-HARRIS,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit

**MOTION OF AMICI CURIAE TO FILE
AMICUS BRIEF OUT OF TIME
&
BRIEF OF AMICI CURIAE
WESTBORO BAPTIST CHURCH
IN SUPPORT OF RESPONDENT**

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MOTION OF AMICI CURIAE
WESTBORO BAPTIST CHURCH
FOR LEAVE TO FILE AMICUS BRIEF
OUT OF TIME

Westboro Baptist Church¹ moves the Court for an order permitting her to file an amicus brief in support of respondent's position in this matter, out of time.

Per Supreme Court Rule 37.3(b), movant advises the Court respondent's counsel has consented to the filing of this amicus brief, and petitioners' counsel have both withheld consent.

Per Supreme Court Rule 37.3(b), movant herewith states the nature of her interest: Movant is an Old School Baptist Church in Topeka, Kansas. Movant's members have engaged in a street picketing ministry for about seven years, addressing the Bible position on the issue of homosexuality. The movant's religious street picketing has occasioned much controversy, which has resulted in political pressure on local officials to take punitive action against the picketing. By virtue of these experiences, movant has had the opportunity to observe circumstances which may be relevant to the Court's consideration on the question of whether local legislators should be afforded absolute immunity or qualified immunity for their legislative acts.

¹ Per Supreme Court Rule 37.6, the Court is hereby advised counsel for movant authored the brief in whole. No person or entity made any monetary contribution to the preparation or submission of this brief other than Westboro Baptist Church and her members.

In addition to movant's rather unique perspective on these issues, movant also has a strong interest in the outcome of this issue, and therefore desires to present a few arguments to the Court for consideration. Citizens who hold and publicly convey a particularly unpopular view are those with the greatest need for fidelity to the Constitution from officials. These citizens have a strong interest in how this Court will respond to instances of demonstrated betrayal of this duty. Movant's members are in such a posture, and thus have a keen interest in how the Court resolves this interest.

Movant's interest and perspective are sufficiently unique, vis-a-vis the parties before the Court, such that movant respectfully believes she can offer some helpful argument on the issue. Movant has no financial interest in this case, nor is she impacted by the outcome of the specific binary dispute in the case before the Court. Further, movant's perspective is quite different from the government's, as represented in the amicus briefs filed herein. This different outlook could provide the Court with insight on the public policy considerations related to legislative immunity. Movant desires the opportunity to present argument which focuses on her needs, and the needs of Americans who find themselves in a similar posture.

The motion to file *out of time* is made because counsel was unaware of the pendency of this case until last week. Events have transpired recently concerning a proposal by the Topeka City Council to pass an ordinance restricting the size of picket signs. These events prompted counsel to update her research on individual liability of local legislators who sponsor or vote for a law which they know to be unconstitutional. Movant does not ask the Court in any fashion to address or comment on the merits of this ongoing

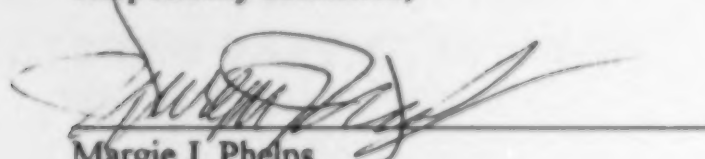
matter, but only informs the Court of the circumstances in general terms to explain why movant did not earlier seek to intervene by the filing of an amicus brief in this matter. Upon researching the issue, counsel learned of the pendency of this action. The importance of this issue to movant, because of immediate concerns, and the long term impact of the Court's decision on legislative immunity, prompted this request.

Per Supreme Court Rule 37.3(b), this motion is attached to the amicus brief which movant seeks to file with the Court in this matter.

For the reasons indicated above, movant respectfully asks the Court to permit filing of the attached brief of amicus.

Further, that the Court considers movant's brief in connection with its review of the question of whether local legislators should be afforded absolute immunity in a Section 1983 action for their legislative acts

Respectfully submitted,



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INTEREST OF THE AMICI CURIAE

Amici curiae Westboro Baptist Church is an Old School Baptist church in Topeka, Kansas. Her members have engaged in religious street picketing, in opposition to the homosexual movement and agenda, on Bible grounds, for about seven years. This religious street picketing has generated a substantial amount of attention and controversy. The local media has gone through cycles of intense coverage, predominantly unbalanced and unflattering. This coverage, for instance, has included editorials which call on local officials to take action which is punitive toward Westboro's members, all with the goal of halting or regulating the picketing. In addition, various groups have formed, long and short term, organizing for the stated purpose of curtailing the daily religious street picketing engaged in by Westboro's members. These groups lobby with local officials, whose campaigns they finance or support in varying degrees, and through a multitude of activities try to influence official action, including legislative, concerning Westboro's picketing.

These circumstances have cased a series of acts by various officials at various levels, responsive to the call by the media and special interest groups to react in some manner to the religious street picketing. Westboro would respectfully suggest that what her members have experienced is a phenomenon on the rise in America. Elected officials and politicians have historically reacted to political and media pressure, and Americans have come to expect nothing less. However, as this country grapples with difficult issues, like abortion, preferential treatment for homosexuals, and the like, the need for politicians to rise above the commotion of

emotion will become crucial. By virtue of her member's controversial street picketing ministry, Westboro has come face to face with the tension between a duty and political livelihood, repeatedly. The manner in which the Court decides and writes on legislative immunity will have direct impact on the ability of Westboro's members -- and those similarly situated -- to resist official reaction to a cry for unconstitutional action.

For these reasons, Westboro is in a position to offer an outlook on this issue which is different from the perspective offered by the parties or others who have provided briefs herein. Further, Westboro has a unique interest in how this issue is decided, because the outcome will have an immediate and direct impact on the ability of her members to protect their constitutional rights.

SUMMARY OF ARGUMENT

There are strong public policy arguments for affording qualified immunity only to local legislators for their legislative acts. The purpose of legislative immunity is to protect the interests of the people, which are reposed in a local legislator. If a local official responds to political pressure and knowingly violates established constitutional rights through legislative acts, the people are not served. Local legislators today have the sophistication and resources available to remain sufficiently informed about what is or is not constitutional, such that they have no need for the considerable protection of absolute immunity. A local legislator acting with a pure heart will receive adequate protection through qualified immunity.

The purpose of Section 1983 is better served through qualified immunity. Section 1983 calls on local legislators to protect constitutional rights, even if doing so is personally distasteful or politically unpopular. If a local legislator knows the law he votes for is wrong, but does so because it is politically popular to cast this vote, the legislator is obstructing the purpose of Section 1983. In that case, the local legislator should be held accountable in a Section 1983 action.

Police officers are afforded qualified immunity only, and can be held liable for enforcing an unconstitutional law, if it is shown the constitutional right violated was well established and the officer acted unreasonably. Municipalities can be held liable in damages for the unconstitutional acts of legislators, which means the people are held liable. An unfair imbalance is created, then, if the people who passed the laws, or engaged in the unconstitutional acts, are shielded completely from liability.

ARGUMENT

The briefs filed in this action recognize a two-part analysis used by the Court in determining whether to afford immunity to certain officials. First, the Court inquires whether the immunity sought was established in the law at the time the Civil Right Act was enacted in 1871. Second, the Court inquires whether the purpose of Section 1983 counsels against recognizing the immunity, even if it was available at common law. The second inquiry will be addressed in this brief.

A. Public Policy Suggests Absolute Immunity Should Not Be Afforded Local Legislators For Legislative Acts Done In Bad Faith

It has been said legislative immunity (as well as other official immunities, e.g., judicial and prosecutorial) are actually immunities given to and for the people.

In perhaps the earliest American case to consider the import of the legislative privilege, the Supreme Judicial Court of Massachusetts, interpreting a provision of the Massachusetts Constitution granting the rights of freedom of speech and debate to state legislators, recognized that "the privilege secured by it is not so much the privilege of the house as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house; but derives it from the will of the people...." *Coffin v. Coffin*, 4 Mass. 1, 27 (1808). This theme underlies our cases interpreting the Speech or Debate Clause and the federal common law of legislative immunity, where we have emphasized that any restriction on a legislator's freedom undermines the "public good" by interfering with the rights of the people to representation in the democratic process. *Spallone v. United States*, 493 U.S. 265, 279, 110 S.Ct. 625, 634, 107 L.Ed.2d 644 (1990).

A rule of absolute -- instead of qualified -- immunity does not carry out this purpose. It is very appropriate to provide a local legislator with protection from suit when he acts in the interest of the people. It is equally inappropriate

to provide a local legislator with protection when he manifestly did not act in the best interest of the people, which should never be defined in a manner that includes patently unconstitutional acts.

This distinction is terribly important in this generation of special interest groups. This country is seemingly awash in special-interest-driven decision making, to the dismay of the average citizen. It is contrary to the interests of the public to afford politicians elected to local legislative positions absolute immunity in this environment. Public policy strongly suggests the best enforcement of the purpose behind this immunity is found by limiting the protection to those instances where the legislator acted reasonably and in accord with well-established constitutional principles.

The Court can judicially note the fact local legislators generally have access to legal advice through attorneys paid for by the people. The Court can further judicially note the trend toward more sophisticated and informed local officials, with access to administrative and legal assistance and advice in the performance of official duties. Further, local officials have access to state attorneys general, through whom they can obtain legal opinions if they are in doubt about the quality of advice they are receiving locally. Information about this Court's decisions are more available to the public, including legislators, than was ever available before. The advent of technology, increased training and professional development opportunities, and the media's greater understanding of and attention to this Court's opinions, are all means through which local officials can be informed about the proper manner of carrying out their oaths to uphold the Constitution.

Any person unwilling to take his oath to uphold and abide by the constitution should not seek public office. It is argued that exposure to litigation will deter people from seeking public office. With respect, this may be more a straw man than fact. The Court can judicially note the many advantages attending holding public office. Even if the pay is limited (which it often is not), there are a variety of personal, political and financial advantages attending public office. Local offices are frequently used as the spring board for higher office. Local office holders gain exposure which generates business contacts with financial advantages. Whether the person seeking office does so out of a purely eleemosynary desire to serve mankind, or out of a baser desire for financial rewards, benefits flow from holding public office.

If a local legislator is acting in accord with the Constitution, he no longer needs fear protracted litigation. The protection available since *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) is adequate for the official who is sensitive to the oath he took to uphold the Constitution. If a legislator knowingly violates this oath, why should he be afforded full immunity? How is that ensuring that the office serves the people?

B. Qualified Immunity Fits The Purposes Of Section 1983 Better

The purpose behind legislative immunity was described by this Court in *Tenney v. Brandhove*, 341 U.S. 367, 383, 71 S.Ct. 783, 786 (1951):

.... 'In order to enable and encourage a representative of the public to discharge his public trust with

firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense.'

Section 1983 calls on public officials to act consistent with the Constitution, and to *not* violate the Constitution. Section 1983 expects this out of officials whether or not doing so is popular with the majority of the citizens served by the official. If the threat of intimidation by powerful forces leads the local legislator to use his legislative power to undertake unconstitutional acts, Section 1983 is violated. In this instance, affording absolute immunity does not carry out the purpose of Section 1983.

To illustrate the point made, we quote from this Court's opinion in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 541, 113 S.Ct. 2217, 1131, 124 L.Ed.2d 472 (1993), describing what the city legislators did in that case:

.... The minutes and taped excerpts of the June 9 session, both of which are in the record, evidence significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice. The public crowd that attended the June 9 meetings interrupted statements by council members critical of Santeria with cheers and the brief comments of Pichardo with taunts. When Councilman Martinez, a supporter of the ordinances, stated that in prerevolution Cuba "people were put in jail for practicing this religion," the audience applauded.

Other statements by members of the city council were in a similar vein. For example, Councilman Martinez, after noting his belief that Santeria was outlawed in Cuba, questioned: "[I]f we could not practice this [religion] in our homeland [Cuba], why bring it to this country?" Councilman Cardoso said that Santeria devotees at the Church "are in violation of everything this country stands for." Councilman Mejides indicated that he was "totally against the sacrificing of animals" and distinguished kosher slaughter because it had a "real purpose." The "Bible says we are allowed to sacrifice an animal for consumption," he continued, "but for any other purposes, I don't believe that the Bible allows that." The president of the city council, Councilman Echevarria, asked: "What can we do to prevent the Church from opening?" (Emphasis added.)

This is a sad testimony to truth, and reflects conduct by elected officials, pandering to popular disagreement with a religious belief and practice, which should not be protected by absolute immunity. The Santeria devotees were left with challenging the ordinances in expensive and protracted litigation in federal court. The entire burden was shouldered by this small group of people whose religion was unpopular. The elected city council members, who used a government platform to impose personal and popular beliefs about what the Bible says, had no risk and no exposure. Neither the purpose of legislative immunity nor the purpose of Section 1983 were served.

Imagine if it was even worse. Imagine if the City Attorney had told the City Council outright, in a public meeting, that the ordinance was unconstitutional. Imagine if

at least one previous effort to pass such an ordinance had been defeated by an executive veto, accompanied by a public statement that the proposed ordinance, and the thinking behind it, was unconstitutional. Imagine if one or more attorneys acting on behalf of the Santeria devotees had appeared before the council and explained in plain terms the unconstitutionality of the proposed legislation. Then you can begin to see why absolute immunity is unfair.

The facts as reflected in this Court's opinion in *Hialeah* raise another point. There the officials charged with protecting constitutional rights were leading the charge trampling those rights. This is not an unheard of situation. We live in a time in our nation's history when it is politically popular to stand in front of a bank of reporters and stir up the passions of the people. Especially on controversial and sensational issues that receive a lot of media attention. Consider the unfairness of allowing an official who stirs up sentiment and foments unrest to use that unrest to justify sponsoring or voting for legislation which is known to be unconstitutional. Imagine, for instance, a candidate running for office on a promise to take official action to stop abortion picketers from picketing in the town where he is running for office. Then, upon taking office, for political gain, the same official sponsors and votes for legislation placing unconstitutional limits on picketing. This official is clearly not acting for the good of the people. Even if he receives accolades from the pro-choice picketers. Even if the local media praises him for standing up to the abortion picketers. Even if the only people speaking up agree with and praise him. This is political pandering, and it should not be allowed to hide behind the skirts of legislative immunity.

If a public official completely ignores well-established constitutional rights, and evidence is produced that he knew he was violating the Constitution, the purpose of Section 1983 is *frustrated* by affording absolute immunity. If a public official opts for personal spite or political popularity and reelection, instead of protecting the known constitutional rights of a controversial, unpopular or dissenting person or group, the purpose of Section 1983 is *thwarted* by affording absolute immunity.

Qualified immunity would strike the proper balance. Officials who were truly acting in good faith would not be required to predict the law at their peril. Their risk would be no greater than any other official afforded qualified immunity. The plaintiff would be required to demonstrate well-established constitutional rights and evidence of unreasonableness. At the same time, those officials who chose to be unfaithful to their oath of office would, appropriately, be accountable. With absolute immunity, officials with an impure heart could -- and would -- thumb their noses at the Constitution, and hide behind immunity. Attorneys for municipalities and counties all over America go into courtrooms every day to defend the actions of local officials. When the local officials have acted wrongfully, they should be in the courtroom with the attorneys.

C. Absolute Immunity To Local Legislators Creates An Imbalance And Inequity

Police officers are only afforded qualified immunity in an action for enforcement of an unconstitutional law. In a recent case in federal district court in New York, the court denied immunity to police officers who enforced an unconstitutional law which violated freedom of expression.

The officers argued they were charged with enforcing laws on the books, which they could not control. The Court acknowledged this fact, but still concluded:

In this case, the law made it clear that the Village ordinance violated the First Amendment. Enforcement of the ordinance in the light of substantial precedent establishing its invalidity was at least arguably unreasonable. Because they are unable to establish the absence of an issue of fact as to the objective legal reasonableness of their actions, defendants are not entitled to qualified immunity on this claim. *Nichols v. Village of Pelham Manor*, --- F.Supp. ---, 1997 WL 436489 at 14 (S.D.N.Y., 7/31/97).

Even if the law is found in the end to be constitutional, the police officer can be sued, and the only immunity he can raise is qualified immunity. *Grossman v. City of Portland*, 33 F.3d 1200 (9th Cir. 1994). With qualified immunity, the officer may often be found not liable, and may be dismissed from the action on a *Harlow* motion. However, if the plaintiff is able to demonstrate the constitutional right was clearly established, and the officer acted unreasonably, the officer can be held to answer to a jury in a Section 1983 action.

If the police officer who is enforcing the law can be held accountable, public policy strongly demands that the legislator who passed the law also be held accountable. Consider the differences in the authority, pay, benefits and influence available to these two positions. An untenable imbalance is created by affording local legislators absolute immunity for legislative acts which are unconstitutional.

Further, if a local legislator acts unconstitutionally, he can expose the municipality to liability for damages. *Berkley v. Common Council of City of Charleston*, 63 F.3d 295 (4th Cir. 1995). If a local legislator can expose the municipality to damages -- which means he is exposing the treasury of the people to damages -- how can he be said to be acting by and for the people? Why should the local official be excused for his intentional constitutional wrongs when no one else is immune *for his* actions?

CONCLUSION

The highest calling of public service is to protect the disenfranchised. The substance of the federal Constitution is protection of the weak and unpopular. These notions, upon which this country was built, have become extremely fragile in this era of sophisticated legal maneuvering on behalf of government officials.

Local legislators are not left to languish, in the dark about what they can and cannot do constitutionally. The adverse impacts on a few of a proper law passed for the good of many are not at issue in this case. Good faith efforts to struggle with sometimes seemingly complex constitutional issues are not at issue in this case. What is at issue, instead, is whether the Court will require that those who swear to an oath to defend the Constitution be held accountable for an intentional and purposeful failure to do so. Particularly when this failure is precipitated by such base motives as money, political popularity or personal spite.

In this nation's history perhaps there were periods when local officials needed the protection of absolute immunity. Those times are a thing of the past. The savvy politician holding office at the city and county level today is not in need of, or entitled to, this degree of protection. A fair balance, between protecting constitutional rights and ensuring local legislators are able to effectively perform when acting in good faith, is found in qualified immunity.